ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of GTE for Declaratory Ruling Regarding the Use of Section 252(i) to Opt-into Provisions Containing Non-Cost-Based Rates	))))	CC Docket No. 99-143

OPPOSITION OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"),[1] by its attorneys, hereby opposes GTE's Petition for Declaratory Ruling in the above-captioned proceeding.[2] In its petition, GTE requests that the Commission issue a declaratory ruling "that requesting telecommunications carriers cannot use [s]ection 252(i) of the Communications Act to 'opt into' provisions of interconnection agreements where the cost or rate element in a provision is no longer cost-based."[3] In the alternative, GTE asks the Commission to "hold any complaints regarding this issue in abeyance and consider the use of [s]ection 252(i) for non-cost-based rates and costs in the *ISP-Bound Traffic Notice* proceeding."[4]

In response, CompTel respectfully submits that the Commission should reject GTE's request for the following reasons: (1) the declaratory ruling requested by GTE contradicts the plain terms of section 252(i); (2) the declaratory ruling requested by GTE contradicts existing Commission rules and orders; and (3) the relief requested by GTE should be

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1 CompTel is a principal national industry association representing competitive telecommunications carriers and their suppliers. CompTel's more than 335 members include large national carriers as well as scores of regional carriers.

2 *Pleading Cycle Established for Comments on GTE Petition for Declaratory Ruling*, CC Docket No. 99-143 (rel. May 6, 1999).

3 *GTE Petition for Declaratory Ruling* at 1 ("*GTE Petition*").

4 *Id.* at 2 (footnote omitted).

sought through a rulemaking proceeding rather than through a declaratory ruling, as the relief requested would eviscerate existing Commission rules without notice. Each of these items is presented in greater detail below.

I. THE DECLARATORY RULING REQUESTED BY GTE CONTRADICTS THE PLAIN TERMS OF SECTION 252(i)

By its terms, section 252(i) prevents discrimination by incumbent local exchange carriers ("ILECs"):

> A local exchange carrier shall make available *any* interconnection service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions as those provided in the agreement.*[5]

The Commission has recognized that "section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251."[6]

Through its petition, GTE is seeking unilateral authority to change the terms and conditions of state commission-approved interconnection agreements to the detriment of CLECs attempting to exercise their section 252(i) rights. In effect, GTE wants to reserve the right to provide an interconnection service to carriers, but not "upon the same terms and conditions as those provided for in the agreement." Any such change in the terms and conditions of interconnection agreements would violate the express language and underlying intent of section 252(i), and thus, as a matter of law, the *GTE Petition* must be rejected.

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5 47 U.S.C. § 252(i)

6 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Memorandum Opinion and Order, 11 FCC Rcd 15499, ¶ 1297 (1996) ("*Local Competition Order*") (subsequent history omitted).

II. THE DECLARATORY RULING REQUESTED BY GTE CONTRADICTS EXISTING COMMISSION RULES AND ORDERS

GTE's fundamental premise is that "[s]ection 51.809 of the Commission's Rules provides that ILECs do not have to make available under [s]ection 252(i) provisions of agreements in which the costs of providing a particular interconnection, service, or element to the requesting carrier are no longer cost-based."[7] GTE flatly misreads the Commission's rules, and its premise contradicts existing Commission orders.

Section 51.809 – the provision upon which GTE relies – provides:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement ... upon the *same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.*
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> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) The costs of *providing* a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible....[8]

In reviewing rule 51.809, the Supreme Court has noted that it "exempts incumbents who can prove to the state commission that providing a particular interconnection service or network

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7 *GTE Petition* at 4.

8 47 C.F.R. §51.809.

element to a requesting carrier is either (1) more costly than providing it to the original carrier or (2) technically infeasible."[9] GTE has failed to make either showing, and thus, the provision on which GTE relies – section 51.809 – forecloses rather than supports the relief requested by GTE.

GTE argues that it should be able to use section 252(i) to discriminate against CLECs on the basis of the services they offer.[10] The Commission already has rejected this argument. In the *Local Competition Order*, the Commission concluded that "section 252(i) does not permit LECs to limit the availability of ... interconnection ... only to those carriers serving a comparable class of subscribers or providing the same services ... as the original party to the agreement."[11] The *Local Competition Order* prohibits GTE from using section 252(i) to discriminate against CLECs that provide different services, or that provide the same services through different technologies or network configurations.

GTE also argues that CLECs should not be permitted to opt into switching rates if they do not use the same hierarchical tandem office-end office switching configuration that GTE uses, however inefficient that configuration may be. Again, the Commission already has rejected this argument. In the *Local Competition Order*, the Commission held that "[w]here the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate."[12] As for pricing, the Commission found:

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9 *AT&T Corp. v. Iowa Util. Bd.*, ___ US ___, 116 S.Ct. 721, 738 (1999).

10 *GTE Petition* at 8.

11 *Local Competition Order* at ¶ 1318.

12 *Id.* at ¶ 1090. *See also*, 47 C.F.R. § 51.711(3) ("Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the (continued...)

> [I]t is reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination. Both the incumbent LECs and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases.[13]

In making these determinations, the Commission held that "using the incumbent LEC's forward-looking economic costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d) that costs be determined 'on the basis of a reasonable approximation of the additional costs of terminating such calls.'"[14] Although the Commission was aware that actual costs may vary among ILECs and CLECs, it established the rule of symmetrical rates because all LECs competing to serve the same customers should have the same incentives to use the most efficient technology in the most efficient ways. While at any given snapshot in time one provider may have a different cost structure than another, over time the rule of symmetrical rates will achieve the correct result with a minimum of burdensome administrative costs. GTE is seeking a declaratory ruling that would reverse three years of consistent Commission precedent beginning with the *Local Competition Order*, as well as myriad state decisions based on the Commission's rules.[15]

(...continued)
incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.")

13 *Local Competition Order* at ¶ 1085.

14 *Id.*

15 *See, e.g., Emergency Petition of ICG Telecom Group Inc. and ITC DeltaCom Communications, Inc. for a Declaratory Ruling*, Docket 26619, Order, at 8 (rel. Mar. 4, 1999);. *Petition of Global NAPS South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc. (Filed December 9, 1998)*, PSC Docket No. 98-540, Arbitration Award, at 11 (rel. Mar. 9, 1999) (emphasis added); *Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications Inc. Against BellSouth Telecommunications, Inc. Regarding Reciprocal Compensation for Traffic Terminated to*
(continued...)

In addition to finding that symmetrical rates comport with the Act's forward-looking pricing standard, the Commission properly found that symmetrical rates would incent carriers to minimize reciprocal compensation rates by driving them to economic cost, which ultimately would benefit consumers. As the Commission concluded, "symmetrical [reciprocal compensation] rates may reduce an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers."[16] In so noting, the Commission recognized that CLECs have very little leverage in negotiating interconnection arrangements with ILECs, making it difficult to drive costs down to economic rates.

GTE's proposal also is impractical as a regulatory and policy matter, as it effectively would require ongoing state commission intervention for any type of new service or technology that competitors introduce. The Commission should expect ILECs, like GTE, to attempt to compartmentalize traffic into additional discrete categories in any case where an ILEC is paying out more reciprocal compensation than it is receiving. At bottom, minutes are minutes, and only by treating all minutes the same will the FCC and state commissions have any hope of driving rates to true economic cost, as promised by the Act. Moreover, under GTE's argument, the least efficient carrier would have the ability to collect the most reciprocal compensation.

(...continued)

Internet Service Providers, Docket No. 981008-TP, Post Hearing Decision at 4 (adopted Mar. 16, 1999). Moreover, in its *Inter-Carrier Compensation Proceeding*, the Commission found that its decision should not be "construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements." Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No 99-68 at ¶ 24 (rel. Feb. 26, 1999) ("*Inter-Carrier Compensation Proceeding*").

16 *Local Competition Order* at ¶ 1087.

Such a regime would discourage efficient network design and could potentially incent all carriers – ILECs and CLECs alike – to configure networks inefficiently to maximize termination fees. To avoid these practical problems, CompTel submits that the Commission should reject the arguments presented by GTE for the same reasons the Commission rejected them three years ago.

III. THE RELIEF REQUESTED BY GTE SHOULD BE SOUGHT THROUGH A RULEMAKING PROCEEDING RATHER THAN THROUGH A DECLARATORY RULING, AS THE RELIEF REQUESTED WOULD EVISCERATE EXISTING COMMISSION RULES WITHOUT NOTICE

As demonstrated above, the relief requested by GTE would require the Commission to overturn a series of Commission rules and findings in various orders, and CompTel submits that any effort to do so through a declaratory ruling, rather than through notice-and-comment rulemaking, is inappropriate. The rules and policies implicated by the *GTE Petition* were promulgated by this Commission through notice-and-comment rulemaking, reviewed by a court of appeals, and ultimately upheld by the Supreme Court. For the Commission to essentially vacate existing rules and promulgate new rules through declaratory ruling would violate fundamental principles of notice-and-comment rulemaking.[17] Thus, the Commission should reject GTE's petition on grounds that the relief requested may not be granted through a declaratory ruling.

Moreover, the issues presented by the *GTE Petition* are largely before the Commission in the ongoing proceeding regarding inter-carrier compensation for ISP-bound

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[17] *See e.g.*, *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901-02 (DC Cir. 1978). Indeed, under the Administrative Procedure Act, an agency is required to publish general notice of a proposed rule in the Federal Register before promulgating a final rule. 5 U.S.C. § 553(b).

traffic.[18] Indeed, in the *Inter-Carrier Compensation Proceeding* the Commission has sought comment on "whether and how section 252(i) and MFN rights affect parties' ability to renegotiate terms of their existing interconnection agreements."[19] Inasmuch as the relief requested by GTE is already the subject of an ongoing proceeding, the Commission, at a minimum, should reject the *GTE Petition* as duplicative.

IV. CONCLUSION

For the reasons state herein, CompTel submits that the Commission should reject GTE's request for declaratory ruling.

Respectfully submitted,

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18 *Inter-Carrier Compensation Proceeding* at ¶ 35.

19 *Id.*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition of the Competitive Telecommunications Association. were served this 17th day of May 1999, by hand on the following:

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